



**Republic v Lemurtunya (Criminal Case E003 of 2021)  
[2023] KEHC 18076 (KLR) (25 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18076 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CRIMINAL CASE E003 OF 2021**

**JN NJAGI, J**

**MAY 25, 2023**

**BETWEEN**

**REPUBLIC ..... PROSECUTION**

**AND**

**DOMINIC LKINYILAN LEMURTUNYA ..... ACCUSED**

**JUDGMENT**

1. The accused is facing a charge of murder contrary to section 203 as read with section 204 of the [Penal Code](#). The particulars of the offence are that on March 24/25, 2021 at Laisamis in Marsabit South Sub-County within Marsabit County he murdered one Joachim Musau (herein referred to as the deceased).

**Prosecution Case -**

2. The case for the prosecution is that the deceased was working with Kenya Power Company Ltd. That on the material day he was in a convoy of three company trucks that were transporting some materials to Mandera. Moses Kariuki PW2 was the driver of the deceased's truck. Onesmus Kimeu PW3 was among the people who were in the convoy. They reached Laisamis town on the evening of March 25, 2021. They decided to spend the night there and booked some rooms at a guest house. PW3 did not leave his room. Kariuki (PW2), the deceased and two others went for supper at a certain bar within Laisamis township. They ate supper and took drinks at the said place. The others returned to their hotel and left the deceased behind. On the following day, the deceased was found dead near Laisamis primary school. Policemen from Laisamis Police Station received the report. They went and picked the body.
3. PC Martin Koome PW7 investigated the case. He escorted the body to Meru County Referral Hospital. Dr Gitura PW6 of the said hospital conducted a postmortem on the body. He found it with lacerations on the right and left frontal regions, laceration on the anterior aspect of the left forearm, comminuted skull fracture on the left maxillary and two linear fractures on top of the head. There was



bleeding into the brain. The doctor formed the opinion that the cause of death was due to head injury secondary to blunt force trauma.

4. The investigators of the case managed to get three witnesses - Joseph Kuposo Nalepo PW1, Abdulrahman Isaak PW4 and Abdullahi Abdul Said PW5.
5. It was the evidence of Abdulrahman Isaak PW4 that on the evening of March 25, 2021 at around 11.30 pm he was chewing miraa outside the veranda to his shop. He was in the company of two other people. A person who was unknown to him approached them and asked them where he could get a lodging room. PW4 directed him to Ikra Lodging. The person went to the direction of the said lodging. He appeared drunk. The person went back after some time and said that that is not what he wanted. PW4 directed him to Super Arcade. The person sat at the veranda of his shop. A person called Kuposo Nalebo, PW1, went to the place. The visitor went towards the direction of Super Arcade. Kuposo went towards the same direction. On the following day he, PW4, heard that a person had been killed. He did not see the body of the person.
6. Kuposo PW1 on his part testified that on the evening of March 25, 2021 he was chewing miraa at the kiosk of a person called Sam. He left the place at 8 pm and headed towards Laisamis town. He passed by the shop of Abdulrahman PW4. He met PW4 seated outside his shop with a short person who appeared drunk. He joined them. He was chewing his miraa. At 11.30 pm PW4 asked him to escort the short person to Nabosu area and the person would offer him "chai." He agreed. They went on foot. On reaching the gate to Laisamis primary school they were confronted by two people whom he identified as David Lkinyilan Lemurtunya (the Accused) and Lmembe Lesurmat. The latter had a knife and a metal rod. Lmembe held him, PW1, and dropped him down. The accused attacked the person he was escorting. He struggled with Lmembe. PW1 was cut by the knife on the hand as they struggled. Lmembe released him and he, PW1, ran towards the primary school. Lmembe joined the accused where the accused was attacking the short person. The person being attacked was screaming. PW1 entered into the primary school. He found the watchman to the school. He informed him on what was going on. He went to his home. He continued to chew miraa.
7. It was further evidence of Kuposo that at 2am Lmembe went to his home. His clothes were blood stained. He told him that the person they had attacked had died. Lmembe asked him where his, Lmembe's, iron bar was. He told him he did not have it. Lmembe asked him to go and see the dead person. They went to the scene of the attack. They found the person lying on the ground. He was bleeding from the head. He appeared lifeless. Lmembe searched his pockets and found a wallet containing an identification card and a job identification card. The job card indicated that the person was working with Kenya Power. Lmembe dropped the wallet. They went away towards town. On the way a person flashed a torch at them. They parted ways. On the following day PW1 went to attend the wedding ceremony of his sister. He went back after 3 days. On the April 9, 2021 he was attending court at Laisamis police station when he was arrested by policemen as a murder suspect. He recorded a statement. He was released after 2 days.
8. The other witness, Abdullahi Abdul Said PW5, testified that he lives at Laisamis town. That his sister was away from home on the night of March 25, 2021. At 2 am he went to check on the house of his sister which was across the road from his house. While on the way back from the house he met with two people. He flashed a torch at them and identified them as Kuposo (PW1) and Lmembe. He asked them where they were going but they did not answer him. Kuposo told his colleague that they go away and they went away. After about 8 minutes he heard shouts. On the following day he heard that a person had been killed.



9. After investigations were complete, PC Koome PW 7 arrested the accused and charged him with the offence. During the hearing PC Koome produced a metal bar as exhibit, Pexh. 2. He said that it was collected at the scene by police officers who visited the scene. The doctor PW6 produced the postmortem report as exhibit, Pexh. 1.

#### **Defence Case -**

10. When placed to his defence the accused gave a sworn statement in which he stated that on the week of the material day he was attending a seminar at Laisamis town that was organized by World Vision. The seminar was starting at 8 am and ending at 5 pm.
11. That on March 25, 2021 he left the seminar at 5 pm. He passed by a coffee base where he stayed for some time. He then went to the butchery of his sister. He assisted her to carry her goods home. He stayed at her home up to 8.30 pm when he retired to his house a short distance away. He slept. After 3 days he was arrested. He denied that he met Kuposo (PW1) on the material night. He said that Kuposo had a grudge against him as there is one time he had stabbed a person called Francis Leite and was charged with the offence. He, the accused, was a witness in the case but the complainant reconciled with the assailant.
12. The accused called two witnesses, his sister DW2 and a brother, DW3. It was the evidence of the Accused's sister that on March 25, 2021 the accused went to her butchery at 7 pm. He helped her to carry her child to her home. He stayed at her home up to 8.30 pm when he left for his home. That the accused does not have a mobile phone. She called a brother called Moses who confirmed that the accused had arrived home.
13. The brother to the accused who testified, Letalian Lemurtunya DW3, stated that he lives with the accused in the same village but in different houses. That on March 25, 2021 the accused returned home at 8.30 pm. The accused does not have a house of his own. On that night he and the accused slept on a mattress outside DW 3's house as DW3's wife and children were sleeping inside his house.

#### **Analysis and Determination –**

14. This being a criminal matter, the standard of proof is that of beyond reasonable doubt. Lord Denning in *Miller vs Ministry of Pensions*, [1947] 2 ALL ER 372 stated this degree to be as follows:

“That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence of course it is possible, but not in the least probable, the case is proved beyond reasonable doubt, but nothing short of that will suffice.”
15. The only evidence that tended to connect the Accused with the offence is that of Kuposo PW1 wherein he stated that he was escorting the deceased towards Nubosu area when on the way they were attacked by the accused and another person called Lmembe. That PW1 managed to escape and left the deceased screaming that he was being killed. That later on the same night Lmembe went to his house and informed him that the person they had attacked had died. PW1 went to the scene of the attack with Lmembe and confirmed that the person had indeed died. They thereafter parted ways and PW 1 went home. On the following day PW 1 went to attend the wedding of his sister. The question is whether the evidence of Kuposo is credible that it is the accused and Lmembe who killed the deceased.



16. The evidence of Kuposo in regard to the incident leaves a lot to be desired. In the first place he says that it is Abdulrahman PW4 who asked him to escort the deceased to Nuboso area in return of being paid a token by the deceased. Abdulrahman on the other hand never mentioned that he asked Kuposo to escort the deceased to that place. His evidence was that the accused followed the deceased after the deceased left to look for a lodging room.
17. Secondly after Kuposo confirmed that the accused and Lmembe had killed the deceased, he did not report the incident to anybody for a period of close to two weeks before his arrest. On the day following the killing, Kuposo left Laisamis town on claims that he was attending the wedding of his sister. He never called any evidence to show that his sister had a wedding. The question then is whether Kuposo was an accomplice to the killing of the deceased.
18. The *Black's Law Dictionary*, 9<sup>th</sup> Edition as cited in *Hosea Mundui Kiplagat v Sammy Komen Mwaita & 2 others* [2013] eKLR, defines an accomplice as;
  - “ 1. a person who is in any way involved with another in the commission of a crime, whether as a principal in the first or second degree or as an accessory...”
  2. A person who knowingly, voluntarily and intentionally unites with principal offender in committing a crime and thereby becomes punishable for it.”
19. In *John Bosco Ndwiga & 2 others v Republic* [2017] eKLR, the Court of Appeal had the following to say on who an accomplice is:

Who is an accomplice? This Court in the case of Antony Kinyanjui Kimani v Rep [2011] eKLR said the following:-

“What legally constitutes an accomplice is not defined in our statutes but section 20 of the Penal Code makes every person who counsels or procures or aids or abets the commission of an offence, a principal offender. Section 396 of the Penal Code also defines an accessory after the fact but it does not cover a person who merely fails to report a crime. In the case of *Watete v Uganda* [2000] 2 EA 559, the Supreme Court held that ‘in a criminal trial a witness is said to be an accomplice if, inter alia, he participated as a principal or an accessory in the commission of the offence, the subject of the trial’. The same definition was restated by the same court in the case of *Nasolo v Uganda* [2003] 1 EA 181 where the court further stated:

“On the authorities, there appears to be no one accepted formal definition of ‘accomplice’. Only examples of who may be an accomplice are given. Whether a witness is an accomplice is, therefore, to be deduced from the facts of each case”.

It was further held in *Kamau v Republic* (1965) EA 581 that:-

“(iv) while a person who aids and abets the commission of a crime or assists the guilty person to escape punishment is always an accomplice, a person who merely acquiesces in what is happening or who fails to report a crime is not normally an accomplice..”



20. The *Black's Law dictionary* 10<sup>th</sup> Edition pg. 17 as cited in Republic v Fredrick Mbindyo Mulei [2021] eKLR, defines an accessory as follows:

“Criminal law. Someone who aids or contributes in the commission or concealment of a crime.”

21. The same defines an accessory after the fact as follows:

“An accessory who was not at the scene of the crime but knows that a crime has been committed and who helps the offender try to escape arrest or punishment.

.... Most penal statutes establish the following four requirements (1) someone else committed a felony before the accessory acted (2) the accessory is not guilty as a principal (3) the accessory personally helped the principal try to avoid the consequences of the felony; and (4) the accessory helped despite having actual or imputed knowledge about the principal's guilty (sic). An accessory after the fact may be prosecuted for obstructing justice.

.....At common law, an accessory after the fact is one who knowing that a felony has been committed by another, receives, relieves, comforts, or assists the felon, or in any manner aids him to escape arrest or punishment. To be guilty as an accessory after the fact one must have known that a completed felony was committed, and that the person aided was the guilty party. The mere presence of the defendant at the scene of the crime will not preclude a conviction as an accessory after the fact, where the evidence shows the defendant became involved in the crime after its commission.”

22. Accessory after the fact is defined under section 396(1) of the *penal code* as follows:

“(1) A person who receives or assists another who is, to his knowledge, guilty of an offence, in order to enable him to escape punishment, is said to become an accessory after the fact to the offence.”

23. From the above definitions and the evidence adduced before the court there is no evidence from which it can be concluded that Kuposo was either an accomplice or an accessory after the fact to the offence of murder. There was no evidence that he aided or contributed in the commission of the crime or that he assisted the culprits to escape punishment. The fact that he failed to report the commission of the crime to the police after he learnt of the death of the deceased does not make him an accomplice or an accessory after the fact.

24. However, the conduct of Kuposo in the whole incident was suspicious. He was the last person to be seen with the deceased by Abdulrahman PW4. After he received a report from Lmembe that the deceased had died, he went to the scene and confirmed that the deceased had indeed died. He did not take any action such as reporting the matter to the police or any other person in authority. He instead disappeared from Laisamis town under pretext that he was attending the wedding of his sister. The question is whether his evidence was credible as to form the basis of convicting the accused person for the offence of murder.

25. The Court of Appeal in the case of *Ndungu Kimanyi v Republic* 1976-1980 KLR 1444 had the following to say on credibility of a witness:

“We lay down the minimum standard as follows. The witness upon whose evidence it is proposed to rely should not create an impression in the mind of the court that he is not a



straightforward person or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.”

26. The prosecution was relying on the evidence of Kuposo, PW1, to prove that the accused and another person still at large called Lmembe are the ones who killed the deceased. For the reasons stated above, the witness did not appear as a straight forward person. He may have been involved in the death of the deceased. That would explain why he did not report the incident to the police and why he escaped from Laisamis town immediately after the death. Though the witness said that he took refuge at the primary school compound when the deceased was being attacked by the accused and his colleague, the investigating officer did not record a statement from the school watchman to corroborate the evidence of the witness on that issue. More so, there was the evidence that on the same night of the murder the witness was seen by Abdullahi PW5 at around 2 am walking while in the company of Lmembe. What was he doing in the company of Lmembe at that hour? I find the witness to be of doubtful credibility and wholly unreliable. The court cannot rely on the evidence of such a witness to convict the accused for the offence of murder.
27. The Accused gave an alibi that he was at his home at the alleged time of the commission of the offence at 11.30 pm. This evidence was supported by his brother, DW3. In face of the unreliable evidence of the key witness for the prosecution, PW1, it was not shown that the accused's defence cannot have been true.
28. The upshot is that the prosecution has failed to prove the charge of murder against the accused to the required standard of beyond reasonable doubt. The Accused is found not guilty of the offence and is acquitted in accordance with the law.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 25<sup>TH</sup> DAY OF MAY 2023.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Otieno for Prosecution

Mr. Halake for Accused - Absent

Accused – present

Court Assistant -

14 days R/A.

